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DISCUSSION RESPONSE

Transnational environmental crime: a challenging problem but not yet a legal concept

TERESA FAJARDO — 15 February, 2017



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A response to Lorraine Elliott

Transnational environmental crime is both a challenging reality and a legal concept in the making. From an international law point of view, this concept is currently being defined by soft law instruments that are transmitting normative expectations about the way States may address it rather than prescribing legal provisions. These instruments are paving the way for the future development of international agreements and play an important part in the

foundations of institutional and inter-state cooperation. This early stage of the norm-creating process is led by the United Nations' institutions with the support of other international organisations that in parallel are building up cooperation networks such as the International Consortium on Combating Wildlife Crime (ICCWC) formed by INTERPOL, the United Nations Office on Drugs and Crime (UNODC), the CITES Secretariat, the World Customs Organization and the World Bank.

As Professor Elliot has put it, there is no international agreement on environmental crime. In fact, most multilateral environmental agreements (MEAs) focus on controlling rather than prohibiting trade on endangered species or transport of hazardous waste, as in the case of the CITES and the Basel Conventions. The main reason for this approach is the lack of consensus among States on the concept of environmental crime and the opportunity of protecting the environment through criminal law. This disagreement is hindering the adoption of the required legal solutions to fight against one of the most serious expressions of environmental crime: the cross-border crimes or transnational environmental crime. The United Nations have been committed to fight against it for decades, but its efforts have not led to the adoption of the most suitable solution: the adoption of an international treaty on transnational environmental crime or of a Protocol to the UN Convention on Transnational Organised Crime. This treaty should include more ambitious proposals such as a common threshold for penal sanctions. Another possibility could consist in introducing in MEAs a conventional clause on universal jurisdiction for those crimes with transnational nature that will make it possible to bring those persons accused of these international crimes to justice. There are

many reasons behind this failure. Some of them are related to the very nature of international environmental law, whose rules have to be introduced and enforced in the domestic legal system of states, and therefore require them to adopt and enforce internal legal measures whose ultimate recipients will be citizens, public and private companies, the judiciary and the law enforcement agencies. However, because States do not agree on the idea of protecting the environment through criminal law, MEAs have left it to States how to sanction these violations: they can adopt administrative, civil and criminal sanctions to fight against them, as for example, Article VIII of CITES recommends. The differences between States' legal systems and their degree of enforcement and compliance have become a major obstacle hindering international cooperation among states and law enforcement agencies to fight transnational environmental crime. States have adopted criminal sanctions that vary enormously: from mere fines up to sanctions of imprisonment. In developed countries the latter rarely rise up to the 4 years, is the amount of time required in order to apply the UN Convention on transnational organized crime. In developing countries, what is here considered as an environmental crime might not even be illegal in other countries or can be sanctioned with the death penalty or shooting on the spot.

Criminal groups take advantage of loopholes in both international environmental law and in domestic law that do not address transnational environmental crime. Thus, it thrives especially in those countries that are the weakest link in the chain regarding implementation and enforcement of environmental law. Transnational environmental crime is often an organized crime that, as in the case of wildlife crime, may involve criminal groups acting in the countries of

origin, transit and destination of the endangered species. This particular type of transnational environmental crime consists in a complex and intricate chain of crimes performed by white collar brokers, warlords, expendable petty thieves and poachers. Together, they commit a variety of crimes such as illegal taking and possession of endangered species, poaching and smuggling of specimens, faking documents, theft and robbery, money laundering, corruption of civil servants and law enforcement agents. Thus, it shows a spectrum of criminality that is connected to other traditional crimes and illegal trafficking such as drugs and arms. Opening criminal proceedings against them is not mandatory in all legal systems due to the principle of legality. However, it can be the result of a political decision that will take into account resource-intensive prosecutions and the reluctance of judges to impose high penalties.

So, the nature of transnational environmental crime makes its prosecution a complex task unless consistency among legal regimes is guaranteed. Otherwise, the only way to obtain convictions is to ignore the transnational nature of the crime, to divide it into offences and to prosecute each of them separately in the country where it was committed, avoiding all the difficulties that could hinder a conviction. To avoid this is why the 2006 UNEP's Manual on compliance with and enforcement of MEAS proposed criminalizing the importation and trafficking of products in violation of 'other states' environmental laws. This approach -as proposed- could have "bolster[ed] consistency in law enforcement across borders and more effectively address[ed] transnational environmental crime and illegal trade by *creating domestic laws that render illegal the importation, trafficking, or acquisition of goods, wastes, and other materials in violation of other States' environmental laws.* In

other words, a State may render domestic trade in a product illegal if that product were taken in violation of another State's laws" (emphasis added). The best example carrying out this recommendation to render a product illegal is the reformed US's Lacey Act that, as Tanczos 2011 posits it, "extends the reach of a seemingly infinite number of foreign laws and regulations making it unlawful to import, export, transport, sell, receive, acquire or purchase . . . any plant taken, possessed, transported, or sold in violation of any federal, Native American tribal, or *foreign laws or regulations*". However, this is an exceptional case.

Resolutions adopted by the UN institutions, in particular, the General Assembly and the UNEP are now asking States to take environmental crime more seriously, which means first to accept to protect the environment through criminal law and then to sanction environmental crime consistently in order to facilitate international cooperation in case of transnational crimes. Expressly, the UNODC Executive Director justified this by saying that "making wildlife crime a serious crime in accordance with the United Nations Convention on Transnational Organized Crime will also facilitate international cooperation". As Professor Elliot explains, this request means to designate illicit trade in wildlife as a serious crime subject to punishment by at least four years deprivation of liberty. This is an unavoidable requirement for the success of policy and judicial cooperation to fight transnational environmental crime, since they depend on the principle of double criminality: the activity has to be considered a serious crime punishable in all the countries affected –countries of origin, transit and destination of wildlife trafficking flows. However, approximation of penalties is not yet on States' agendas and the lack of consistency of the sanctions is hindering

international cooperation. Nor is the adoption of a legal concept of transnational environmental crime that takes to the next level the criminological proposals, as discussed by Professor Elliot, on the State's agendas.

Taking environmental crime seriously, is also about raising awareness among national authorities, in particular the judiciary and law enforcement agencies, about the threat posed by environmental crimes not just to the planet but overall security: environmental crimes thrive among criminal organizations because a rhino horn or an elephant tusk is more valuable than cocaine or gold. However, this seems not to be important enough to change the way these crimes are perceived by national judges and law enforcement agencies. A clear example is the recent Spanish Supreme Court decision filing the case against Vidal Armadores accused of falsification, money laundering, organised crime and the environmental crime of illegal fishing in international waters (Spanish Supreme Court 23.12.2016). The decision declared that the Convention for the Conservation of Antarctic Marine Living Resources was not a sufficient legal basis to convict the accused. It also refused to apply the principle of personality of criminal law, since the principle of double criminality was not applicable since the activity took place on the high seas. On the other hand, before this Supreme Court, drug trafficking in international waters is given a completely different treatment, since to fight it is considered to be in the interest of the international community according to the restrictive interpretation given to universal jurisdiction, in which there is no room to fight against transnational environmental crimes committed on the high seas as those foreseen in the Convention for the Conservation of Antarctic Marine Living Resources. This explains why UNODC, INTERPOL and domestic law

enforcement agencies have prioritized the fight against transnational environmental crime through the traditional crimes linked to it; traditional crimes will result in convictions – until environmental crime is taken seriously. The state-of-the-art of transnational environmental crime is just a doctrinal category, even one that raises awareness and catchy one, but not yet a legal concept, ready to be applied.

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